APPELLATE CIVIL.

1908
May 18.

Before Mr. Justice Aikman and Mr. Justice Griffin.

FAZL-UR-RAHMAN AND OTHERS (DECREE-HOLDERS) *v.* SHAH MUHAMMAD KHAN AND OTHERS (JUDGMENT-DEBTORS).*

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 179—*Execution of decree—Limitation—Appeal—Appeal not pressed—Terminus a quo.*

Where there has been an appeal from a decree limitation does not the less begin to run from the date of the final decree in appeal because the appeal may have been dismissed upon the representation of the appellants' counsel that he was unable to support it. *Jeeyangar* v. *Lakshmi Dass* (1) followed. *Hingan Khan* v. *Ganga Parshad* (2) and *Fazal Husen* v. *Raj Bahadur* (3) distinguished.

THIS was an appeal arising out of an application to execute two decrees which were passed on the 8th of March 1901. Against these decrees appeals were preferred to the High Court. When the appeals were called on for hearing, counsel for the appellants informed the Court that he was unable to support the appeals, and they were accordingly dismissed, no costs being awarded to the respondents, as they were not represented. On this judgment decrees were passed by the High Court affirming the decrees of the Lower Court. The application was within time, reckoning from the date of the decrees of the High Court, but would be barred by limitation if time were computed to run from the date of the decrees of the Court of first instance. The Lower Court (Subordinate Judge of Aligarh) held that, as the appeals to the High Court were not supported, time must be held to run from the date of the decrees of the Court of first instance, and accordingly dismissed the application as barred by limitation. Against this order of the Lower Court the decree-holders appealed to the High Court, contending that limitation should be computed as from the date of the dismissal of the appeals by the High Court.

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *W. Wallach*, for the respondents.

* First Appeal No. 218 of 1907 from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 15th of April 1907.

(1) (1907) 16 M. L. J., 393. (2) (1876) I. L. R., 1 All., 293.
(3) (1897) I. L. R., 20 All., 124.

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FAZL-UR-RAHMAN v. SHAH MUHAMMAD KHAN.

AIKMAN and GRIFFIN, JJ.—The sole question raised in this appeal is whether an application for execution presented by the appellants is or is not barred by limitation. The application was to execute two decrees which were passed on the 8th of March, 1901. Against these decrees appeals were preferred to this Court. When the appeals were called on for hearing the learned counsel for the appellants informed the Court that he was unable to support the appeals, and they were accordingly dismissed, no costs being awarded to the respondents, as they were not represented. On this judgment decrees were passed by this Court affirming the decrees of the lower Court. It is admitted that the appellants' present application is within time, if time is reckoned from the date of the decrees of this Court, but would be barred by limitation if time be computed to run from the date of the decrees of the Court of first instance. The lower Court has held that, as the appeals to this Court were not supported, time must be held to run from the date of the decrees of the Court of first instance, and has accordingly dismissed the application as barred by limitation. Against the order of the lower Court the present appeal has been preferred. In our judgment the appeal must succeed. It seems to us that the language of article 179 of schedule II of the Limitation Act is perfectly clear and is in favour of the appellants' contention. That article allows three years from the date of the decree or order, or, where there has been an appeal, from the date of the final decree or order of the appellate Court. There was undoubtedly an appeal in the case before us, and a final decree was passed by the appellate Court. The application is within three years from the date of the final decree. For the respondents reliance is placed upon two decisions of this Court in *Hingan Khan* v. *Ganga Parshad* (1) and *Fazal Husen* v. *Raj Bahadur* (2). In our opinion these cases are distinguishable from the present, as in the former the appeal was withdrawn, and the question which had to be dealt with was as to the time to be allowed for payment of pre-emption money. Moreover, the language of article 179 was not referred to. In the second of these, to which one of us was a party, the appeal abated. It

(1) (1876) I. L. R., 1 All., 293. (2) (1897) I. L. R., 20 All., 124.

appears that the decree-holder in that case appealed against one Hardayal, a judgment-debtor. Hardayal died, and the decree-holder failed to bring on the record his legal representatives. It was held that the only extant decree was the original decree of the Munsif. In the Full Bench case of *Jeeyangar* v. *Lakshmi Dass* (1) the Madras High Court held that when an appeal is entertained and an order made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time for execution runs from the date of the order of the appellate Court. The learned Judges in that case dissented from certain decisions of the Bombay High Court in which an opposite view had been taken. We agree with the opinion expressed by the Full Bench of the Madras High Court. If a judgment-debtor's appeal, as sometimes happens, is pending for upwards of three years, and if it were held that the appellant judgment-debtor, by withdrawing or declining to support his appeal, or by omitting to bring on the record the representatives of a deceased respondent, could, notwithstanding the fact that an appeal had been filed, cause time to run from the date of the original decree, it would in our opinion be going directly against the language of the Limitation Act and would open a door to fraud. We allow the appeal, and, setting aside the order of the lower Court, send back the case to that Court with instructions to re-admit the application under its original number in the register and dispose of it according to law. The appellants will have the costs of this appeal. Other costs will follow the event.

Appeal decreed and Cause remanded.

(1) (1907) 16 M. L. J., 393.

1908.
May 20.

Before Mr. Justice Aikman and Mr. Justice Griffin.

JANGI SINGH (JUDGMENT-DEBTOR) v. CHANDAR MOL (DECREE-HOLDER).*

Act No. XV of 1882 (*Transfer of Property Act*), *section* 90— *Application for a personal decree against mortgagor—Limitation—Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 116.

Held that the fact that there is no express personal covenant to pay the mortgage money is no bar to the mortgagee obtaining a personal decree under section 90 of the Transfer of Property Act, 1882, against the mortgagor if the requirements of the section are otherwise fulfilled: a personal covenant to pay is implied in and is an essential part of every simple mortgage. *Sawaba Khandapa* v. *Abaji Jotirav* (1) not followed. *Unichaman* v. *Ahmed Kutti Kayi* (2) referred to.

Held also that on an application under section 90 of the Transfer of Property Act it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. *Hamid-ud-din* v. *Kedar Nath* (3) followed.

THE facts of this case are as follows:—

On the 5th of August 1893, Jangi Singh executed a deed of simple mortgage in favour of Chandar Mol. The money was payable on demand. The bond contained no personal covenant to pay. It was a registered instrument. The mortgagee on the 25th of July 1900, instituted a suit for sale on the mortgage and also asked for a personal decree against the mortgagor. On the 16th of August 1900, the mortgagee got an *ex parte* decree for sale. No personal decree was passed against the mortgagor. The property was sold on the 20th of December 1906, and, the proceeds of the sale having proved insufficient to pay the amount due on the mortgage, the decree-holder applied for a decree under section 90. The judgment-debtor raised an objection on the ground of limitation. This was overruled by the Court of first instance (Subordinate Judge of Shahjahanpur) and the decision of that Court was affirmed on appeal by the District Judge. Both the lower Courts found that there had been a payment by the judgment-debtor of interest on the 16th of June 1895, that is to say within six years of the date when the suit was filed. The judgment-debtor appealed to the High Court.

Babu *Surendra Nath Sen* and Babu *Jogindro Nath Mukerji*, for the appellant.

* Second Appeal No. 1174 of 1907 from a decree of C. D. Steel, District Judge of Shahjahanpur, dated the 13th of August 1907, confirming a decree of Achal Bihari, Subordinate Judge of Shahjahanpur, dated the 11th of May 1907.

(1) (1887) I. L. R., 11 Bom., 475. (2) (1897) I L. R., 21 Mad., 242.
(3) (1898) I L. R., 20 All., 386.

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JANGI SINGH v. CHANDAR MOL.

Babu *Jogindro Nath Chaudhri* and Babu *Beni Madho Ghosh*, for the respondent.

AIKMAN and GRIFFIN, JJ.—This is an appeal by a judgment-debtor. The question which we have to decide is whether an application made by the respondent for a decree against the appellant under section 90 of the Transfer of Property Act is time-barred. On the 5th of August 1893, the appellant executed a deed of simple mortgage in favour of the respondent. The money was payable on demand. The bond contained no personal covenant to pay. It was a registered instrument. The respondent, on the 25th of July 1900, instituted a suit for sale on the mortgage and also asked for a personal decree against the mortgagor. On the 16th of August 1900, the respondent got an *ex parte* decree for sale. No personal decree was passed against the mortgagor. The property was sold on the 20th of December 1906, and, the proceeds of the sale having proved insufficient to pay the amount due on the mortgage, the respondent applied for a decree under section 90. The appellant raised an objection on the ground of limitation. This was overruled by the Court of first instance and the decision of that Court was affirmed on appeal by the learned District Judge. The judgment-debtor comes here in second appeal. The Courts below have found that there was a payment by the appellant of interest on the 16th of June 1895. That payment was within six years of the date when the suit was filed. On an application under section 90 it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. The learned vakil for the appellant contends, relying on the decision of the Bombay High Court in *Sawaba Khandapa* v. *Abaji Jotirav* (1), that, as there is not in the registered mortgage deed any personal covenant to pay, the respondent is not entitled to take advantage of article 116 of the second schedule of the Limitation Act, which allows a period of six years for a suit for breach of a contract in writing and registered. That decision does support the argument on behalf of the appellant. It was considered in a later Madras ruling in the case of *Unichaman* v. *Ahmed Kutti Kayi* (2). In that case the learned Judges remark :—"If

(1) I. L. R., 11 Bom., 457. (2) (1897) I. L. R., 21 Mad., 242.

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this liablity be taken to be one arising under a covenant implied by law as incidental to the mortgage contract, which was in writing and registered, then article 116 of the Limitation Act would apply, otherwise the appropriate article is 120, the case not being otherwise provided for." The Bombay ruling was distinguished on the ground that when it was decided the Transfer of Property Act was not in force in Bombay. Whether that would be sufficient for distinguishing the Bombay case in the present appeal we are not prepared to say. The facts of this case are on all fours with a case decided by this Court—*Hamid-ud-din* v. *Kedar Nath* (1). That case is against the appellant. It is true that in that case the special plea raised by the appellant was not considered. But we think that a personal covenant to pay, although not expressed, is implied in and is an essential part of every simple mortgage. The respondent's right to a decree under section 90 therefore was a part of and arose out of a contract in writing and registered, and we think that he is entitled to the benefit of article 116. The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

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May 25.

Before Mr. Justice Aikman and Mr. Justice Griffin.

RANJIT SINGH (DECREE-HOLDER) *v.* BALDEO SINGH AND ANOTHER (JUDGMENT-DEBTORS).*

Civil Procedure Code, section 318—*Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 178—*Execution of decree—Limitation—Terminus a quo.*

Although the grant of a certificate is a necessary preliminary to an application under section 318 of the Code of Civil Procedure, such application will be barred under article 178 of the second schedule to the Indian Limitation Act, 1877, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. *Basapa* v. *Marya* (2) and *Kashinath Trimbak Joshi* v. *Duming Zuran* (3) dissented from. *Petition of Kishen Singh* (4) referred to.

In this case one Ranjit Singh, on the 20th of November 1897, purchased certain immovable property in execution of a decree

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* Second Appeal No. 985 of 1907 from a decree of H. W. Lyle, District Judge of Agra, dated the 8th of June 1907, reversing a decree of Chajju Mal, Subordinate Judge of Agra, dated the 2nd of February 1907.

(1) (1898) I. L. R., 20 All., 385. (3) (1892) I. L. R., 17 Bom., 228.
(2) (1879) I. L. R., 3 Bom., 433. (4) Weekly Notes, 1883, p. 262.

obtained by him against Baldeo Singh and another and the sale was confirmed on the 5th of January 1898. The auction purchaser took no steps to obtain a sale certificate until the 15th of September 1905, and a certificate was granted to him on the 21st of March 1906. On the 3rd of January 1907 he applied under section 318 of the Code of Civil Procedure to be put in possession of the property which he had bought in 1897. The judgment-debtor objected that the application was barred by limitation. This objection was overruled by the Court of first instance, (Subordinate Judge of Agra) but on appeal was sustained by the learned District Judge. The auction purchaser appealed to the High Court.

Munshi *Govind Prasad*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

AIKMAN and GRIFFIN, JJ.—The appellant, on the 20th of November 1897, purchased certain immovable property in execution of his own decree, and the sale was confirmed on the 5th of January 1898. The appellant took no steps to obtain a sale certificate until the 15th of September 1905, and a certificate was granted to him on the 21st of March 1906. On the 3rd of January 1907, he applied under section 318 of the Code of Civil Procedure to be put in possession of the property which he had bought in 1897. The judgment-debtor objected that the application was barred by limitation. This objection was overruled by the Court of first instance, but on appeal was sustained by the learned District Judge. The auction purchaser comes here in second appeal. The only plea argued before us was that the application was not barred. In support of this contention reliance is placed on the decisions of the Bombay High Court in *Basapa* v. *Marya* (1) and in *Kashinath Trimbak Joshi* v. *Duming Zuran* (2). These decisions undoubtedly support the contention of the appellants; but, with all deference to the learned Judges who decided them, we do not find ourselves in agreement with them. We concur with what was said by the dissenting Judge, Kemball, J., in the earlier of the two cases. It is no doubt true that, according to the language of section 318 of the Code, an application under that section cannot be made

(1) (1879) I. L. R., 3 Bom., 433. (2) (1892) I. L. R., 17 Bom., 228.

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until a certificate has been granted under section 316. But section 316 provides that the certificate is to bear, not the date on which it is actually issued, but the date of the confirmation of sale, and in our judgment the certificate must be deemed to have been granted on the date which it bears, just as a decree is deemed to have been passed, not on the date on which it is signed, but on the date on which the judgment was pronounced. We are of opinion that, although the grant of a certificate is a necessary preliminary to an application under section 318, such application will be barred under article 178 of the second schedule to the Limitation Act, if not made within three years of the date on which the certificate is granted, which we take to mean the date it bears, that is, the date of the confirmation of sale. If the auction purchaser delays for upwards of three years in asking for the certificate to which he is entitled he does so at his own risk. It has been held by this Court—see *Petition of Kishen Singh* (1)—that there is no limitation for an application for a sale certificate. If we take it that his right to apply under section 318 arises, not from the date which the certificate bears, but from the date on which it happens to be issued, an auction purchaser might come in with an application under section 318 twenty years after the date when title to the property vested in him. The view which we take now is supported by an unreported decision of our brother Richards in Execution Second Appeal No. 1401 of 1907, decided on the 12th of this month. For the reasons given above we are of opinion that, whatever other right the appellant may have to enforce his title to the property which he bought, the Court below was correct in holding that his application under section 318 is barred. The result is that we dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes., 1883, p. 262.

O.P.W.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

PARTAP SINGH (JUDGMENT-DEBTOR) *v.* THE DELHI AND LONDON BANK, Ld. (DECREE-HOLDER).*

1908 *June* 5.

Civil Procedure Code, section 503—*Receiver—Appointment of receiver to realize amounts of decrees under attachment.*

Where a decree-holder had in execution of his decree attached two decrees held by the judgment-debtor against third parties, it was *held* that section 503 of the Code of Civil Procedure gave power to the Court to appoint a receiver to realize the amounts of the attached decrees where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected.

IN this case the Delhi and London Bank, Limited, held a decree against one Partap Singh, for Rs. 35,000. In execution of this decree the Bank attached two decrees held by Partap Singh, the aggregate amount of which was considerably in excess of the Bank's claim. The Bank applied for sale of the decrees. The judgment-debtor presented an application to the Lower Court stating that if the decrees were sold, the result would be that both he and the Bank would be losers, and he prayed the Court to appoint a receiver to realize the amounts of his decrees attached by the Bank. The Court below (Subordinate Judge of Bareilly) agreed with the judgment-debtor that there was very little likelihood of the decrees fetching a suitable price at the auction sale. But he was of opinion that section 503 of the Code of Civil Procedure did not apply to the case and accordingly rejected the application. The judgment-debtor appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The respondent was not represented.

AIKMAN and KARAMAT HUSAIN, JJ.—This is an appeal from an order of the Court below refusing the appellant's application for the appointment of a receiver. The respondent Bank, which is not represented here, held a decree against the appellant for Rs. 35,000. In execution of this decree the respondent Bank attached two decrees held by the appellant, the aggregate amount of which is said to be upwards of a lakh of rupees. The Bank applied for sale of the decrees. The judgment-debtor presented an application to the lower Court stating that if the decrees were sold, the result would be that both he and

* First Appeal No. 35 of 1907, from an order of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 15th of January 1907.

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the Bank would be losers, and he prayed the Court to appoint a receiver to realize the amounts of his decrees attached by the Bank. The learned Subordinate Judge in his order under appeal states that the judgment-debtor's case is a pitiable one, as there is very little likelihood of the decrees fetching a suitable price at the auction sale. But he was of opinion that section 503 of the Code of Civil Procedure did not apply to a case like the present, and accordingly rejected the application. In our opinion the opening words of the section are wide enough to cover a case like the present. We accordingly allow the appeal, set aside the order of the lower Court, and remand the case to that Court with instructions to re-admit the application under its original number in the register and adopt proper steps for the appointment of a receiver. We make no order as to costs.

Appeal decreed.

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May 21

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

KALLU AND ANOTHER (PLAINTIFFS) *v.* FAIYAZ ALI KHAN AND OTHERS (DEFENDANTS)*

Hindu law—Hindu widow—Money advanced on personal security of widow—Decree against widow binding only on her widow's estate—Res judicata—Civil Procedure Code, section 13.

Where money is lent to a Hindu widow on her personal security, a decree for such a debt and a sale of property late of the widow's husband in execution of such decree binds only the widow's estate, notwithstanding that the original debt may have been incurred for legal necessity. *Dhiraj Singh* v. *Manga Ram* (1) followed.

K and S (two brothers) executed a usufructuary mortgage of their respective shares in certain property. The share of S was then purchased in execution of a simple money decree by D. The share of K was after his death brought to sale in execution of a simple money decree against K's widow and purchased by G. G transferred his rights to R, who was D's brother. D sued for redemption of half the mortgaged property, naming as defendants the mortgagee, the heirs of S, and R. Pending this suit R died and D amended his plaint, claiming redemption of the whole. The heirs of S did not defend this suit, which was decided *ex parte* as against them, and the suit was compromised by D's widow. The heirs of S then, claiming as next reversioners to K on the death of his widow, brought the present suit, seeking to redeem

*Second Appeal No. 819 of 1906 from a decree of J. H. Cuming, Additional Judge of Aligarh, dated the 2nd of August 1906, confirming a decree of Sheo Prasad, Munsif of Khurja, dated the 19th of August 1905.

(1) Weekly Notes, 1897, p. 67.

half of the mortgaged property. *Held* that the suit was not barred by section 13 of the Code of Civil Procedure, inasmuch as the plaintiffs, though they might have done so, were not bound in the former suit to raise the defence that D was not entitled to redeem more than half of the mortgaged property.

THIS was a suit to recover possession of a half share in 76 bighas and 5 biswas, which was mortgaged by two brothers, Sher Singh and Khaman Singh in 1858. The plaintiffs alleged that the mortgage debt had been satisfied by the usufruct. The brothers are said to have been separate and each is said to have mortgaged his half share of the property. The equity of redemption of Sher Singh was brought to sale in execution of a simple money-decree held by Deokishen and was purchased by Deokishen himself. He died and was succeeded by his widow Musammat Ganga, respondent No. 2. Both the mortgagors, Sher Singh and Khaman Singh also died. Khaman Singh was succeeded by his widow Musammat Gaura, who is also dead. The plaintiffs claimed as heirs to Khaman Singh. Khaman's widow Musammat Gaura executed a simple money bond on the 21st of December 1883 in favour of Deokishen for the sum of Rs. 95. Deokishen got a decree on the bond on the 8th of March 1887. In execution of that decree Gaura's rights and interests in the property mortgaged were sold and bought by one Ganga Prasad. On the 21st January 1889 Ganga Prasad sold these rights and interests to Ram Chandar, brother of Deokishen. On the 17th of March 1892 Deokishen brought a suit to redeem half the property. The defendants to the suit were (1) the predecessor in title of Nawab Sir Faiyaz Ali Khan, respondent No. 1, who had by purchase acquired the rights of the original mortgagees, (2) the plaintiff's brother Ram Chandar, and (3) the present appellants, the heirs of the mortgagors. Ram Chandar died during the progress of that suit, and Deokishen, alleging that he was Ram Chandar's heir, amended his plaint and asked to redeem the whole 76¼ bighas. Only the representative of respondent No. 1 contested the suit. On the 13th September 1898 Deokishen got a decree for redemption of the whole property subject to the payment of Rs. 1,000 to Nawab Sir Faiyaz Ali Khan. Against this decree two appeals were preferred, one by Nawab Sir Faiyaz Ali Khan and the other by Deokishen. Deokishen died during the pendency of the appeals and his widow Musammat

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Ganga was brought on the record as his legal representative. The present plaintiffs were not made parties to the appeals. These appeals ended in a compromise, and a decree on the compromise was passed on the 20th of December 1900. Under the compromise both the appeals were withdrawn. Musammat Ganga was to get Rs. 4,000 and the decree of the lower Court for redemption was to be treated as if it never existed ("kaladam"). The Court of first instance (Munsif of Khurja) dismissed this suit finding that the debt incurred by Musammat Gaura was incurred for legal necessity, and that the sale in execution of the decree against her passed the whole of Khaman Singh's rights. One of the defences to the suit was that the plaintiffs' suit was barred by the decree passed in the suit of Deokishen instituted on the 17th of March 1892. This plea was overruled by the Court of first instance. The plaintiffs appealed against the decree of that Court dismissing their claim, and the respondents filed an objection under section 561 of the Code of Civil Procedure, assailing the finding of the first Court on the question of *res judicata*. The lower appellate Court (Additional Judge of Aligarh) without dealing with the question raised by the plaintiffs' appeal, sustained the objection filed by the respondent No. 1, and, holding that the plaintiffs' suit was barred by section 13 of the Code of Civil Procedure, dismissed it. Against the decree of the lower appellate Court the plaintiffs appealed to the High Court.

Dr. *Tej Bahadur Sapru* and Munshi *Gobind Prasad*, for the appellants.

Mr. *Abdul Majid*, Babu *Jogindro Nath Chaudhri* and Maulvi *Rahmatullah*, for the respondents.

KNOX and AIKMAN, JJ.—This appeal arises out of a suit brought by the appellants to recover possession of a half share in 76 bighas and 5 biswas, which was mortgaged by two brothers Sher Singh and Khaman Singh in 1858. The plaintiffs' allegation is that the mortgage debt has been satisfied by the usufruct. The brothers are said to have been separate and each is said to have mortgaged his half share of the property. The equity of redemption of Sher Singh was brought to sale in execution of a simple money decree held by Deokishen and was purchased by

Deokishen himself. He is dead and is represented by his widow Musammat Ganga, respondent No. 2. Both the mortgagors Sher Singh and Khaman Singh are dead. Khaman Singh was succeeded by his widow Musammat Gaura, who is also dead. The plaintiffs claim as heirs to Khaman Singh. It appears that Khaman's widow Musammat Gaura executed a simple money bond on the 21st of December 1883 in favour of Deokishen for the sum of Rs. 95. Deokishen got a decree on the bond on the 8th of March 1887. In execution of that decree Gaura's rights and interests in the property mortgaged were sold and bought by one Ganga Prasad. On the 21st January 1889 Ganga Prasad sold these rights and interests to Ram Chandar, brother of Deokishen. On the 17th of March 1892 Deokishen brought a suit to redeem half the property. The defendants to the suit were (1) the predecessor in title of Nawab Sir Faiyaz Ali Khan, respondent No. 1, who had by purchase acquired the rights of the original mortgagees, (2) the plaintiff's brother Ram Chandar, and (3) the present appellants, the heirs of the mortgagors. Ram Chandar died during the progress of that suit, and Deokishen, alleging that he was Ram Chandar's heir, amended his plaint and asked to redeem the whole 76¼ bighas. Only the representative of respondent No. 1 contested the suit. On the 13th September 1898 Deokishen got a decree for redemption of the whole property subject to the payment of Rs. 1,000 to Nawab Sir Faiyaz Ali Khan. Against this decree two appeals were preferred, one by Nawab Sir Faiyaz Ali Khan and the other by Deokishen. Deokishen died during the pendency of the appeals, and his widow Musammat Ganga was brought on the record as his legal representative. The present plaintiffs were not made parties to the appeals. These appeals ended in a compromise, and a decree on the compromise was passed on the 20th of December 1900. Under the compromise both the appeals were withdrawn. Musammat Ganga was to get Rs. 4,000 and the decree of the lower Court for redemption was to be treated as if it never existed ("kaladam"). The Court of first instance dismissed this suit, finding that the debt incurred by Musammt Gaura was incurred for legal necessity, and that the sale in execution of the decree against her passed the whole of Khaman Singh's rights. One of

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the defences to the suit was that the plaintiff's suit was barred by the decree passed in the suit of Deokishen instituted on the 17th of March 1892. This plea was overruled by the Court of first instance. The plaintiffs appealed against the decree of that Court dismissing their claim, and the respondents filed an objection under section 561 of the Code of Civil Procedure, assailing the finding of the first Court on the question of *res judicata*. The learned Additional Judge, without dealing with the question raised by the plaintiffs' appeal, sustained the objection filed by the respondent No. 1, and, holding that the plaintiffs' suit was barred by section 13 of the Code of Civil Procedure, dismissed it. Against the decree of the lower appellate Court the plaintiffs have preferred the present appeal.

The first question we have to decide is, whether the sale in execution of the decree on the simple money bond executed by Musammat Gaura was a sale only of her life interest in the property or whether it passed the estate of her deceased husband Khaman Singh. As said above, the learned Munsif decided that the whole estate passed by the sale. In our opinion that decision cannot be supported. When Deokishen lent money to Musammat Gaura in 1883 he chose to do so on her personal security. He did not obtain from her any mortgage of her husband's property. That being so, we hold that any decree which he obtained on his simple money bond could only bind the rights and interests of his debtor on whose personal security he had advanced the money. Musammat Gaura is dead. She had only a widow's estate, and with her death the rights and interests in the property in suit purchased in execution of the decree against her came to an end. In support of this view we may refer to what is said in paragraph 641 of the 7th edition of Mayne's Hindu Law and to the case *Dhiraj Singh* v. *Manga Ram* (1). This disposes of the first issue which we have to decide.

The next question that arises is whether the present suit of the plaintiffs is barred by what took place in the suit for redemption instituted by Deokishen in 1892. It is true that in that suit, by the amendment of his plaint, Deokishen claimed to redeem the whole property. It appears that in that suit no issue was framed

(1) Weekly Notes, 1897, p. 67.

as to whether in point of fact Deokishen did or did not own the equity of redemption, and consequently it cannot be said that the issue as to his owning the whole was "heard and finally decided" by the Court. The learned counsel for the defendant, however, relies on explanation II to section 13 of the Code of Civil Procedure, which enacts that any matter which might and ought to have been made a ground of defence in a former suit shall be deemed to have been a matter directly and substantially in issue in that suit. As we have said, the present plaintiffs did not appear to defend the suit, and the decree was passed *ex parte* against them. The present plaintiffs might in that suit undoubtedly have raised the plea that Deokishen was not the owner of the equity of redemption of the whole of the property. But although they might have raised such a defence, we are of opinion that it was not incumbent on them to do so. It was not necessary for the Court to decide the issue as to the extent of Deokishen's rights to enable it to pass the decree which it did. Deokishen admittedly owned a share in the equity of redemption, and, that being so, he was entitled to redeem the whole. We hold that, this being so, the plaintiffs as representatives of one of the co-mortgagors were not bound in the previous suit to raise the issue as to whether or not Deokishen owned the equity of redemption over the whole. We hold, therefore, that the plaintiffs are not precluded by anything in the previous suit from maintaining their present claim. We have already held on the first question that we have to decide that the property itself did not pass at the sale in execution of the decree obtained against Musammat Gaura, but only her rights and interests. The plaintiffs as the heirs of one of the original co-mortgagors are therefore entitled to maintain this suit for redemption. Issues were remitted to the lower appellate Court to decide two questions of fact, namely, what was the amount secured by the mortgage which it is sought to redeem, and next, whether or not that amount has been discharged by the usufruct of the property. On these issues the lower appellate Court has found, first, that the amount secured by the mortgage is Rs. 425, and next, that the mortgage debt has long ago been discharged by the usufruct. Objections have been filed by the respondent. One objection is

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that on the finding of the lower appellate Court that the mortgage debt has been satisfied long ago out of the usufruct, the suit of the plaintiffs is barred by limitation. This plea, however, was abandoned before us. Another objection has been raised as to the finding of the lower Court in regard to the amount of the mortgage money. The respondents contended that the terms of the wajib-ul-arz of 1890 show that the amount secured by the mortgage was Rs. 1,000. We have examined this wajib-ul-arz and we agree with the construction placed on it by the lower appellate Court. We set aside the decrees of the Courts below and decree the plaintiffs' claim as set forth in relief (*a*) of the plaint. The plaintiffs will have their costs here and in the Courts below.

This case was very ably argued by the learned advocates for the parties, particularly by the learned advocate for the appellants.

Appeal decreed.

1908
May 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

COLLECTOR OF MIRZAPUR (PLAINTIFF), *v.* DAWAN SINGH AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 116—Limitation—mortgage—Suit for compensation for the breach of a contract in writing registered.

A registered mortgage bond provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession; further, that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the mortgagee would have power to realise the amount secured by the bond with the interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged.

Held that a suit based upon the foregoing covenant to recover the mortgage money upon failure of the mortgagor to pay instalments was in substance a suit for compensation for breach of contract, to which the limitation prescribed by article 116 of the second schedule to the Indian Limitation Act, 1877, applied. *Husain Ali Khan* v. *Hafiz Ali Khan* (1) referred to.

THIS was a suit to recover the amount of a mortgage bond, dated the 17th of April 1899. It was a registered document,

* Second Appeal No. 10 of 1907 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 12th of September 1906, modifying a decree of Amjadullah, Subordinate Judge of Mirzapur, dated the 1st of June 1906.

(1) (1881) I. L. R., 3 All., 600.

and provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession. It further provided that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the creditor would have power to realise the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged. The first instalment was payable on the 16th of December 1899. The present suit was brought on the 15th of December 1905. The Court of first instance (Subordinate Judge of Aligarh) decreed the plaintiff's claim. On appeal, however, this decree was reversed by the District, Judge who dismissed the suit, holding it to be barred by limitation. The plaintiff appealed to the High Court.

Mr. *A. E. Ryves*, for the appellants.

Mr. *Muhammad Raoof*, for the respondent.

STANLEY, C. J. and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff appellant to recover the amount of a mortgage bond, dated the 17th of April 1899. It was a registered document, and provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession. It further provided that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the creditor would have power to realise the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged. The first instalment was payable on the 16th of December 1899. The present suit was brought on the 15th of December 1905. The Court below has dismissed the suit, holding it to be barred by limitation, and has referred to the case of *Ram Narain* v. *Kamta Singh* (1) as an authority in support of its view. That ruling in our opinion has no bearing whatever on the present case. That was a suit for arrears of rent, for which there is specific provision in schedule II of the Limitation Act. The present suit is

(1) (1903) I. L. R., 26 All., 138.

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one for money payable under a mortgage bond. As the property mortgaged consisted of mortgagee rights, it was assumed, according to the ruling in force at the time when the suit was brought, that the mortgaged property could not be sold, but there is the clear covenant in the bond that the money would be recoverable in case of default in delivering possession from the person and other property of the mortgagors. This was, in our opinion, a suit which was governed by article 116 of schedule II, being in substance a suit for compensation for breach of contract, namely, the contract to deliver possession and pay the amount secured by the bond in case of default in delivering possession. The bond being a registered instrument, the period of limitation under that article was six years, and the suit was therefore within time. This view is in consonance with the ruling of a full Bench of this Court in *Husain Ali Khan* v. *Hafiz Ali Khan* (1). The result is that we allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts.

Appeal decreed.

1908
May 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUL KUNWAR AND OTHER (DEFENDANTS) *v.* CHATTAR SINGH (PLAINTIFF) AND MUSAMMAT NAUGI (DEFENDANT).*

Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 116*—Limitation—Suit for compensation for the breach of a contract in writing registered.*

A deed of sale of immovable property, duly registered, contained a covenant to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. The purchaser, failing to get possession of part of the property purchased, sued for possession, or in the alternative for a refund of a proportionate part of the consideration money and damages. *Held* that as regards the latter relief the suit was governed by article 116, and not by article 97, of the second schedule to the Indian Limitation Act, 1877.

THE facts out of which this appeal arose are as follows:—

Two brothers, Dip Chand and Lajja Ram, owned certain property. Dip Chand died in 1876 leaving him surviving his sons

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*Second Appeal No. 296 of 1907 from a decree of H. J. Bell, District Judge of Aligarh, dated the 22nd of December 1906, confirming a decree of Pitambar Joshi, Subordinate Judge of Aligarh, dated the 26th of January 1905.

(1) (1881) I. L. R., 3 All., 600.

Kanhaiya Lal and Makhan Lal and a widow Musammat Naugi. The names of these persons were entered in the revenue records in regard to his half share of the property. Lajja Ram died in 1885. His share devolved on his nephews Makhan Lal and Kanhaiya Lal. Makhan Lal died leaving a minor son, Ghanshiam Das, and a widow, Musammat Mul Kunwar. On the 16th of September 1898 Mul Kunwar sold one-half of the property to the plaintiff. On the 10th of January 1899 Kanhaiya Lal sold the other half. The plaintiff applied for the entry of his name in respect of the entire village, but his application was rejected on the 16th of August 1899 as regards the share which was recorded in the name of Musammat Naugi, the widow of Dip Chand. The plaintiff then sued for a declaration of his right and for possession against Naugi, but that suit was dismissed on the 23rd of November 1900. On the 9th of July 1904 he brought the present suit against Musammat Mul Kunwar and her minor son Ghanshiam Das as the principal defendants, and he claimed the following reliefs (1) that possession be awarded over the property, (2) that if possession be not awarded a proportionate part of the consideration for the sale with interest be awarded to him, and in case the first relief was granted, that he might be awarded further damages.

The Court of first instance (Subordinate Judge of Aligarh), granted the second prayer in the plaint, and the decree of that Court was affirmed by the lower appellate Court (District Judge of Aligarh). The defendants Mul Kunwar and Ghanshiam Das appealed to the High Court.

Dr. *Satish Chandra Banerji* and Pandit *Mohan Lal Nehru*, for the appellants.

Munshi *Gulzari Lal*, Babu *Parbati Charan Chatterji* and Babu *Surendra Nath Sen*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The suit which has given rise to this appeal was brought under the following circumstances:—Two brothers, Dip Chand and Lajja Ram, owned certain property. Dip Chand died in 1876 leaving him surviving his sons Kanhaiya Lal and Makhan Lal and a widow Musammat Naugi. The names of these persons were entered in the revenue records in regard to his half share of the property. Lajja Ram died in 1885. His share devolved on his nephews Makhan Lal

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and Kanhaiya Lal. Makhan Lal died leaving a minor son, Ghanshiam Das, and a widow, Musammat Mul Kunwar. On the 16th of September 1898 Mul Kunwar sold one-half of the property to the plaintiff. On the 10th of January 1899 Kanhaiya Lal sold the other half. The plaintiff applied for the entry of his name in respect of the entire village, but his application was rejected on the 16th of August 1899 as regards the share which was recorded in the name of Musammat Naugi, the widow of Dip Chand. The plaintiff then sued for a declaration of his right and for possession against Naugi, but that suit was dismissed on the 23rd of November 1900. On the 9th of July 1904 he brought the present suit against Musammat Mul Kunwar and her minor son Ghanshiam Das as the principal defendants, and he claimed the following reliefs (1) that possession be awarded over the property, (2) that if possession be not awarded a proportionate part of the consideration for the sale with interest be awarded to him, and in case the first relief was granted, that he might be awarded further damages.

The Court of first instance granted the second prayer in the plaint, and the decree of that Court has been affirmed by the lower appellate Court.

The defendants have preferred this appeal, and the first contention raised on their behalf is that the claim is barred by limitation. We may observe that this plea was not set up in either of the Courts below. The contention is that the suit is one for money paid on an existing consideration which has failed, and that therefore article 97 of Schedule II of the Limitation Act applies, and, as the suit was brought after three years from the date on which the plaintiffs' suit against Musammat Naugi was dismissed, this claim is time-barred. We do not think this contention is right. The claim is upon a covenant contained in the sale deed, that covenant being to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. Now this is clearly a suit on that covenant and for the breach of it, namely, the failure of the defendants to put the plaintiff into possession of the share of the property sold which

was recorded in the name of Musammat Naugi. The claim therefore was clearly one governed by article 116 of schedule II, as the sale deed was a registered instrument.

The next contention is that under the covenant the plaintiff was not entitled to any refund, as he was aware of the title set up by Musammat Naugi at the time of his purchase. This contention also has in our judgment no force. The parties were probably aware of the fact that a part of the property was entered in the name of Musammat Naugi, and it was apparently for that reason that the purchaser took the covenant from the vendor to which we have referred above, which is an absolute covenant.

For these reasons we think the Courts below were right and we dismiss the appeal with costs.*

Appeal dismissed.

* This case was followed in F. A. f. O. No. 38 of 1908, *Ram Jaggi Rai* v. *Kauleshar Rai*, decided on the 22nd June 1908, the judgment in which is printed below :—

AIKMAN and KARAMAT HUSAIN, JJ.—The plaintiff, who is respondent here, purchased certain landed property from the defendants. The sale deed set out that the property was unincumbered. It contained a covenant that if the vendee should be dispossessed of any portion of it the vendors would repay a proportionate amount of the sale price with interest at 2 per cent. In consequence of a decree obtained by a prior incumbrancer the plaintiff was dispossessed of a portion of the property on the 8th of April 1904. On the 14th of July 1907 he filed the suit in which this appeal arises, to recover from the defendants the proportionate value of the share of the property of which he had been dispossessed together with interest. The Court of first instance dismissed the suit, holding that it fell within article 97 of schedule II of the Limitation Act, which provides a period of three years for a suit to recover money paid upon an existing consideration which afterwards fails, the time from which the period begins to run being the date of failure. The plaintiff appealed. The learned Subordinate Judge allowed the appeal and remanded the case under section 562 of the Code of Civil Procedure for decision on the merits. Against that order of remand the present appeal has been preferred. The learned Subordinate Judge was of opinion that the suit fell within article 116 of the second schedule, which allows six years for a suit for compensation for the breach of a contract in writing and registered. We are clearly of opinion that the suit does fall within that article and that the view taken by the learned Subordinate Judge is right, The cases cited by the learned counsel for the appellants, namely, *Ram Chandar Singh* v. *Tohfa Bharti* (I. L. R., 26 All., 519) and *Hanuman Kamat* v. *Hanuman Mandur* (I. L. R. 19 Calc., 123) are clearly distinguishable. In the case *Tulshi Ram* v. *Muridhar Chaturbhuj Marwadi* (I. L. R., 26 Bom., 750) it was argued for the

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appellant, whose suit had been dismissed as barred by limitation, that even if article 116 applied, the suit was time barred. The learned Judges did not touch on this plea at all. The decision of the Court below is in accordance with a recent decision of this Court (as yet unreported) in Second Appeal No. 296 of 1907 disposed of on the 22nd of May last. It was there held that a similar suit to the present "was clearly one governed by article 116 of schedule II, as the sale deed was a registered instrument." For the above reasons we are of opinion that the appeal fails, and it is dismissed with costs.

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May 29.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HARPAL SINGH AND OTHERS (DEFENDANTS) *v.* LEKHRAJ KUNWAR (PLAINTIFF) AND JANKI KUNWAR (DEFENDANTS).*

Hindu law—Succession—Impartible estate—Estate devised to widow of owner —Suit by reversioner—Compromise—Estate taken by reversioner.

The owner of an impartible estate to which the rule of primogeniture applied died leaving a will which purported to give the whole estate aboslutely to his widow. After the death of the testator the next reversioner sued to recover the estate and pleaded that the will set up by the widow was invalid. The parties to this suit entered into a compromise, the main provisions of the compromise being that the widow should be the "gaddi-nashin" during her life and should give the plaintiff a monthly allowance, and that after the death of the widow the plaintiff or any representative (*kaem makam*) who might be living should be the absolute owner of all the movable and immovable properties possessed by the testator and should occupy the "gaddi". The plaintiff reversioner predeceased the widow.

Held on suit by the widow of this reversioner to recover the estate as against certain other members of her husband's family who were in possession, that the effect of the compomise was that a vested interest in the estate in the character of an impartible estate was, subject to the life interest of the widow, limited to the plaintiff reversioner, and that upon his death the estate descended to his heir according to the rule of primogeniture and not to his widow.

Rani Mewa Kuwar v. *Rani Hulas Kuwar* (1), *Gobind Krishna Narain* v. *Abdul Qayyum* (2), *Bachcho Kunwar* v. *Dharam Das* (3) and *Ram Shankar Lal* v. *Ganesh Prasad* (4)] referred to. *Abdul Wahid Khan* v. *Nuran Bibi* (5) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji* for the appellants.

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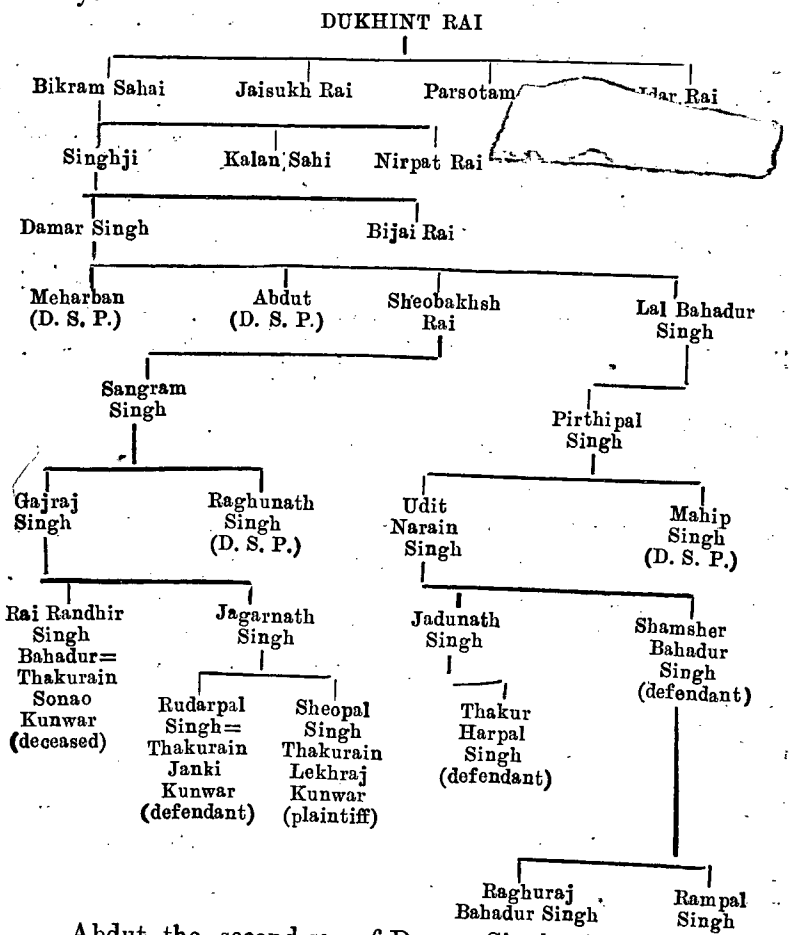
* First Appeal No. 94 of 1906, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 24th of February 1906.

(1) (1874) L. R., 1 I. A., 157. (3) (1906) I. L. R., 28 All., 347.
(2) (1903) I. L. R., 25 All., 546. (4) (1907) I. L. R., 29 All., 451.
(5) (1885) I. L. R., 11 Calc., 597.

Mr. *B. E. O'Conor* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The title to the Singramau estate in the district of Jaunpur, an estate of considerable extent and value, is involved in this appeal. This estate was, up to the date of the death of Rai Randhir Singh on the 4th of January 1895, admittedly impartible. The following genealogical table which is admitted to be correct, will show the relationship of the family.



Abdut, the second son of Damar Singh, died childless in 1795 and was succeeded by his nephew Sangram Singh, and he was succeeded by his eldest son Gajraj Singh, who died in 1857. Rai Randhir Singh, the eldest son of Gajraj Singh, then succeeded

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to the property. Three weeks before his death he executed a will in favour of his wife Thakurain Sonao Kunwar of all his property. His nephew Sheopal Singh was his nearest male relative at the time of his death, and he, on the 28th of March 1896, instituted a suit against Sonao Kunwar for possession of the estate, alleging that Randhir Singh was not of sound and disposing mind when he made his alleged will. He also averred that the estate was impartible and inalienable, and therefore Randhir Singh had no power to dispose of it as he purported to do. This suit was compromised on the 25th of April 1896, and practically the only question which we have to determine is the effect of this compromise.

The learned District Judge delivered a very elaborate and lengthy judgment, but with many of the topics to which he has referred we think it unnecessary to deal. It is admitted that the estate in the hands of Randhir Singh was an impartible estate, and it is also admitted that Sheopal Singh would have succeeded to that estate if no valid disposition had been made of it by Randhir Singh. Therefore it appears to us to be unnecessary to treat of matters prior to the death of Randhir Singh, except so far as they show the circumstances of the family and throw light on the documents which we have to construe.

Sheopal Singh predeceased Musammat Sonao Kunwar, dying on the 27th of July 1899. She died on the 20th of June 1904. Sheopal Singh left a widow, the plaintiff Lekhraj Kunwar, and also a daughter, but no son. Upon his death, if it be held that he acquired under the compromise an absolute interest in the estate it still being an impartible estate, the defendant appellant Thakur Harpal Singh would admittedly be now entitled to it according to the rule of primogeniture. We may here mention that a number of villages were appropriated for the maintenance of the junior members of the family a number of years back. Nine villages were set apart for Pirthipal's branch and four for Sheopal. Of the nine villages five were sold, and the members of the family to whom they belonged have now only proprietary rights therein. The members of the family are still therefore joint in estate, though they are separate in food and worship. Whatever be the rights of the family in these villages,

they form part of the estate, and if the junior branches become extinct will revert to the head of the family. We may also here mention the fact that the junior members of the family did not live in harmony with the members of the senior branch, but on the contrary there was constant ill-feeling and litigation between them. There is no contest between Harpal Singh and Shamsher Bahadur Singh. They have agreed to divide the estate between them in the event of their appeal being successful. The contest is between them and Thakurain Lekhraj Kunwar, whose case is that Sonao Kunwar under the will of her husband Randhir Singh acquired the property as her *stridhan*, and that under the compromise, in the events which have happened, the property has devolved upon her as the representative of Sheopal Singh. On the death of Sonao Kunwar Harpal Singh got possession of the estate, mutation of names having been effected in his favour.

We now turn to the impeached will of Randhir Singh, which is dated the 15th of December 1894. It opens with a detail of the property which the testator was possessed of, and then follows a recital that the testator has no male issue and that there was no sensible and qualified man in the family to look after and manage the estate and acquire fame; that his nephew Sheopal Singh was separate from him, and that his conduct and manners were quite unworthy and incompatible with the position of a rais and that he had no hopes that he would maintain the reputation of the family. He then appoints his wife Sonao Kunwar "as legatee of my entire estate and every kind of movable and immovable property of which I am in possession up to this time, and Babu Sridat, whom I brought up from a child, as manager," and then he declared that they should hold proprietary possession of his estate and entire movable and immovable property from the date of his death, and that the legatee, that is, Sonao Kunwar, should have every power as proprietor and Babu Sridat should manage the estate in obedience to and with the advice of the legatee. Then the testator gave a direction that the legatee should keep in view the fact that Sheopal Singh was separate and owing to his misconduct the testator did not eat with him, yet that he had set apart some property for his support and that she should continue the support. This is the substance of the will.

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It is unnecessary for us to determine what estate M[redacted] Sonao Kunwar took under this will, assuming it to have been a valid will, whether she took an absolute estate or merely a Hindu widow's estate. Sheopal Singh at once disputed the will, and on the 28th of March 1896 instituted a suit against Sonao Kunwar and Babu Sridat to have it declared that the will was void and for possession of the estate of Randhir Singh and mesne profits. The plaint in that suit is to be found in First Appeal No. 25 of 1903, No. 11C of the record. In the first paragraph of it the estate of Singramau is described as impartible and untransferable, the custom of the family being that the senior male member is the occupant of the gaddi while the rest of the members are recipients of maintenance, and that on the death of an occupant of the gaddi no right to the estate passes to the widow, but that the eldest son succeeds him and supports all the members of the family with the income of the estate. In the second paragraph the succession is traced from Dukhint Rai to Randhir Singh. Then the fifth paragraph contains an allegation that when Randhir Singh was in a weak and dying condition he was brought to Jaunpur, so as to be taken to Ajudhiaji so that he might end his days there, and that when he was in this condition the defendants obtained from him the will in favour of Musammat Sonao Kunwar. Then follows an allegation that on account of old age, weakness and illness Randhir Singh was quite incapable of forming a rational judgment in respect of his affairs and incapable of making a will. In the sixth paragraph is the allegation that on the death of Randhir Singh, according to old custom and the nature of the property, and also by right of survivorship, the right to occupy the gaddi and take possession of the entire property passed to the plaintiff. Before the institution of this suit Sonao Kunwar had, on the 21st of June 1895, applied for probate of the will of Randhir Singh, and this application was opposed by Sheopal Singh. The suit of Sheopal Singh was compromised, and it is upon the true construction of the compromise that the real question in this appeal depends. The translation of it in the paper book before us has been accepted by both sides, and with the exception of a few words in it which might be otherwise and better translated, and to which we shall presently refer, it appears to be substantially accurate. In view

of its importance we give it *in extenso*: it runs as follows:—

"In the above case a compromise has been effected between the parties in the following way:—

"1. The name of Musammat Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded and she will remain in possession during her life-time of all the movable and immovable properties of which Rai Randhir Singh was in possession, exercising the po of gaddi-nashin (occupant of gaddi) without the power t or charge the estate in any way.

"2. I, Thakur Sheopal Singh, will take the sum of Rs. 12,000 a year at the rate of Rs. 1,000 per month from Musammat Thakurain Sonao Kunwar for all my expenses, and I, Musammat Thakurain Sonao Kunwar, will pay the same. I, Thakur Sheopal Singh, will not interfere with the estate in any way in the life-time of Musammat Sonao Kunwar. After the death of Thakurain Musammat Sonao Kunwar, I, Thakur Sheopal Singh or any representative of mine who may be living at that time, will be the absolute owner of all the movable and immovable properties possessed by Rai Randhir Singh and will occupy the gaddi. In case of non-payment of the fixed annual allowance, I, Thakur Sheopal Singh, will have power to recover the same by instituting a suit and attaching the profits and movable property belonging to Thakurain Sonao Kunwar.

"3. If I, Thakur Sheopal Singh, have to go to any member of the brotherhood, or any rais on the occasion of any ceremony or otherwise, I will have authority to take as much equipage belonging to the estate as I require, and when I go out for recreation *et cetera*, I will take any conveyance I like for my use. Thakurain Sonao Kunwar will have no power to forbid me.

"4. If on any particular occasion any indispensable necessity arise in the estate and it be necessary to take a loan, we, Thakur Sheopal Singh and Musammat Thakurain Sonao Kunwar, will, in concurrence with each other, borrow five or ten thousand rupees and repay the same gradually from the profits of the estate.

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"5. I, Thakurain Sonao Kunwar, also accept all the aforesaid conditions. It is therefore prayed that the case may be struck off as a contested one on the basis of this compromise and the costs incurred by the parties be charged against themselves. This compromise may be embodied in the decree. Musammat Thakurain Shankar Kunwar and Sridat *pro formâ* defendants have been exempted.

"The compromise as written is correct."

A decree was passed in the terms of the compromise on the 27th of April 1896.

The contention on behalf of the defendants is that under this compromise a vested interest in the estate in the character of an impartible estate was, subject to the life estate of Musammat Sonao Kunwar, limited to Sheopal Singh, and that upon his death it passed to his next heir according to the rule of primogeniture and not to his widow. On the other side the contention is that the compromise maintained the possession of Musammat Sonao Kunwar under the will, with a restriction only on alienation imposed upon her: that the impartibility of the estate was destroyed by the will of Randhir Singh, and that Sonao Kunwar held the estate as an estate governed by the ordinary rules of Hindu law, and that upon her death, Sheopal Singh having predeceased her, it devolved on the plaintiff respondent as his personal representative.

The learned District Judge held that Musammat Sonao Kunwar took an absolute alienable estate in the property under her husband's will, and that apart from the compromise Sheopal Singh had no title whatever; that any right which he acquired was acquired under, and was referable to, the compromise. His views are thus expressed in the judgment:—"If the question arises under what title A took what was awarded to him under a compromise of doubtful rights between himself and B, it must be ascertained which was the better title before the compromise to the estate awarded to A, A's or B's. The decision of this point will not alter the fact that A took the estate allotted to him under the compromise, but it will determine whether A took it under his own antecedent title or by virtue of the abandonment by B of his antecedent title. We have then to apply this reasoning

to the compromise between Musammat Sonao Kunwar and Sheopal Singh. It has been found that Musammat Sonao Kunwar had an absolute alienable estate and hence that Sheopal Singh had no title whatever in himself except a contingent title in the event of Musammat Sonao Kunwar dying without alienating the estate by gift or devise. Had he survived Musammat Sonao Kunwar, whatever he took under the compromise he would have taken not under his own supposed title as owner, which had no existence, nor even as a reversioner to a widow's estate, which was not the title he set up, for this title too had no existence, but by virtue of Musammat Sonao Kunwar's abandonment of her rights as absolute owner. This was a title arising out of the compromise only—a title by contract, and not a title based on Sheopal Singh's antecedent right."

Does this accurately represent the facts and is the exposition of the law laid down by the learned District Judge correct? If the will of Randhir Singh was not valid, then on the death of Randhir Singh Sheopal Singh became entitled to the estate as his successor. Sheopal Singh impeached the will of Randhir Singh on the ground that Randhir Singh was not a competent testator, and also on the ground that the estate was not merely impartible but inalienable. He claimed the estate as the successor of Randhir Singh according to the rules of primogeniture and he claimed it as an impartible estate. Whether he had sufficient grounds for impeaching the will it is not, we think, material to consider. But in view of the circumstances under which the will was made it would be difficult to hold that his suit was without foundation. The will was made shortly before the death of Randhir Singh, who was a decrepit old man of 74 years of age in a dying condition. The learned District Judge went behind the compromise. He determined what the rights of the parties were before the compromise, the very thing the avoidance of which led to the compromise. He determined the dispute which the parties designedly left undetermined, and held in effect that the will was a valid will and binding on Sheopal Singh, overlooking the fact that Sheopal Singh withdrew his opposition to the will on the faith of the compromise. If Sheopal Singh had not

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withdrawn his opposition, it is impossible to say what would have been the result of his suit or of the probate suit.

Now let us see what the provisions of the compromise were, bearing in mind the circumstances which led up to it. It provides in the first paragraph that Sonao Kunwar shall remain in possession of the estate during her life-time "exercising the powers of gaddi-nashin," and in the next paragraph, in which an annuity of Rs. 12,000 a year is provided for Sheopal Singh during the life of Sonao Kunwar, it is provided that after the death of Sonao Kunwar Sheopal Singh will be the absolute owner of the estate and will occupy the gaddi. The words gaddi-nashin and gaddi are only properly applied in connection with an impartible estate, and the use of them in the compromise indicates that the intention of the parties was that the estate should continue impartible, as it had been for generations. In other words, the compromise was a recognition by Sonao Kunwar of the claim put forward by Sheopal Singh that the estate was impartible. Sheopal Singh on his part made this concession to Sonao Kunwar that during her life, subject to the payment of the annuity and to certain other restrictions, she should remain in possession and exercise the powers of gaddi-nashin. It seems to us that by the compromise the parties agreed that the estate should retain its old character of impartibility.

But it is argued that, inasmuch as letters of administration of the estate of Randhir Singh with the will annexed were subsequently granted to Sonao Kunwar, it must be taken that the will had full operation, and that by it the impartible nature of the estate was destroyed, and that, whatever was the interest which Sheopal Singh acquired under the compromise, that was an interest in an estate which was no longer impartible, but an estate governed by the ordinary rules of Hindu law. As to the grant of letters of administration what happened was this. After the execution of the compromise Sheopal Singh withdrew him opposition to the grant of letters of administration with the will annexed. He filed a petition on the 25th of April 1896 in which he stated that he had no objection to the grant, a compromise having been effected. It was no longer any concern to him whether the will was proved or not. His rights were secured by the

Hulas Kuwar, on the ground of heirship to immovable property situate in Rohilkhand and Oudh. By a deed of compromise they agreed to divide the property in certain proportions, and the agreement was carried out in Rohilkhand, but not in Oudh, where the respondent was and continued in possession. After the lapse of nine years from the date of the deed of compromise, the appellant Rani Mewa Kuwar sued for possession of her share of the property in Oudh. The Judicial Commissioner of Oudh decided that the suit was founded on the contract contained in the deed of compromise, or for a breach of it, and was therefore barred by limitation. It was held by their Lordships of the Privy Council that the claim did not rest on contract only, but on a title to the land acknowledged and defined by the contract, which was part only of the evidence of the appellant to prove her case, and not all her case. Their Lordships say, at page 164, referring to the compromise :—" That agreement assumes that the parties were severally claiming by virtue of some right of inheritance the property of Raja Rattan Singh; that there were questions between them which might disturb the rights which each claimed, and it was better, instead of a long litigation, to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares and shall be divided according to those shares." Then at page 166, they say :—" The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case." The principle laid down in this case has been adopted in several cases in this High Court.

In the case of *Gobind Krishna Narain* v. *Abdul Qayyum* (1) the title taken under a compromise between persons having mutually exclusive claims was considered. On the death of one Rattan Singh disputes arose between his widow, Raj Kunwar, and Sen Kunwar, the widow of his son Daulat Singh, who had predeceased his father. After the death of the two widows three

(1) (1903) I. L. R., 25 All., 546

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to be his legitimate sons. Gauhar Bibi was in possession of the villages in dispute in the Rae Bareli district at the annexation of Oudh in 1856, and the summary settlement was made with her, and after the general confiscation followed by the restoration and the summary settlement of that year, the settlement of the villages was again made with her. She continued in possession till her death on the 18th of October 1875. In the course of proceedings at the regular settlement litigation took place between the alleged sons on the one side and Gauhar Bibi on the other, resulting in a compromise, by which it was agreed that Gauhar Bibi should during her life-time continue to hold possession and remain proprietor without power of alienation and that after her death the two sons should possess each one half of the property. The two sons predeceased Gauhar Bibi. It was held that upon the true construction of the compromise the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their deaths in her life-time. The case came before their Lordships of the Privy Council on appeal from the Judicial Commissioner of Oudh, who held that the effect of the compromise was to give Gauhar Bibi a life interest in the estate, and on the death of Abdur Rahman and Abdus Subhan their heirs took their place and had a right to their property on Gauhar Bibi's death. Their Lordships held that the creation of such a life estate did not seem to be consistent with Muhammadan usage, and that it would be opposed to the Muhammadan law to hold that the compromise created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the life-time of Gauhar Bibi. It will therefore be seen that this decision was based upon Muhammadan law, according to which it is not permitted to limit an estate to take effect after the determination on the death of the owner of a prior estate by way of what is known in English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate. The limitation of such an estate is in no way prohibited by Hindu law, and it appears to us clear upon the true interpretation of the compromise entered into between Sheopal Singh and Sonao Kunwar that Sheopal Singh took an absolute vested estate in the

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claimants to the estate arose, namely, Chattar Kunwar and Mewa Kunwar, the daughters of Sen Kunwar, and Khairati Lal, the son of a daughter of Rattan Singh. The conflicting claims of these parties were settled by a compromise by virtue of which Khairati Lal obtained 7½ annas and Chattar Kunwar and her sister Mewa Kunwar 4¼ annas each out of the property of Rattan Singh. It was contended that Khairati Lal had complete title to the whole of the property subject to the compromise, he being son of Rattan Singh's daughter, and that he made a grant to the two Ranis of more than half the property out of kindly feeling towards them. This argument was repelled as devoid of force. The Bench, of which one of us was a member, held that the parties came together as persons at arm's length, each side claiming the whole estate, through different lines of descent, each side having a good fighting title, and to avoid litigation consented to an amicable division of the disputed estate.

Again in the case of *Bachcho Kunwar* v. *Dharam Das* (1), which was heard by a Bench of which one of us also was a member, the effect of a compromise was also considered. Two persons named Paras Das and Umrao Singh laid claim to property as reversionary heirs of Pardman Kunwar. Their claim was resisted by Dip Chand on the allegation that he was the adopted son of Pardman Kunwar and as such entitled to succeed to his property. A compromise was entered into according to which the right of Paras Das and Umrao Singh to one half of the property was recognized, they mutually abandoning all claims to the other half. It is evident that if Dip Chand failed to establish the validity of his adoption, Paras Das and Umrao Singh would as reversionary heirs have succeeded in their claim to the whole of the property of Pardman Kunwar. If, on the other hand, the validity of the adoption was established, the claim of Paras Das and Umrao Singh was bound to fail. It was held that the compromise and decree passed on it amounted to a recognition by Dip Chand of the rights of Paras Das and Umrao Singh as reversionary heirs, as they had previously asserted them, so far as regards one half of the property, and could not be

(1) (1906) I. L. R., 28 All., 347

regarded as conferring a new and distinct title on them; that Paras Das and Umrao Singh in fact under the compromise acquired a moiety of the property in the capacity of reversionary heirs of Pardman Kunwar and in that capacity alone. Reliance was placed upon the judgment of their Lordships of the Privy Council in the case of *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* referred to above in this judgment.

The same question was considered by another Bench of this High Court, of which also one of us was a member, in the case of *Ram Shankar Lal* v. *Ganesh Prasad* (1). The facts of that case were these. One Munni Lal died leaving certain property, of which his widow Jasodha Kunwar took possession. Jasodha Kunwar died leaving the property by will to her daughter Anpurna, who also died after making a will leaving the property to her husband Ram Shankar Lal. Both the wills provided that the devisee was to pay off certain incumbrances affecting the property. After the death of Anpurna the property was claimed by the reversionary heirs of Munni Lal. But this claim was settled by a compromise by which Ram Shankar Lal gave certain land to the claimants in consideration of their entirely withdrawing their claim to the rest of the property. It was held that the compromise did not convey to Ram Shankar Lal the title of the reversioners, but that he took under the will of his wife. We find in the judgment this observation in reference to the compromise:—"We think that by this deed the executants of it, in view of the trouble and uncertainty which would attend a suit for possession of the property, relinquished their claim to bring such a suit and admitted the title by virtue of which Ram Shankar Lal was then in possession. It did not, in our opinion, clothe Ram Shankar Lal with all the rights which the executants had as reversioners to Munni Lal's estate."

Mr. *O'Conor*, in the course of his ingenious and able argument for the respondents, relied on the ruling in *Abdul Wahid* v. *Nuran Bibi* (2). That was a case between Muhammadans and was governed by Muhammadan law. One Mauzzam Khan died on the 22nd of January 1850 leaving a widow named Gauhar Bibi and also Abdus Subhan and Abdur Rahman who claimed

(1) (1907) I. L. R., 29 All., 451. (2) (1885) I. L. R., 11 Calc., 597.

property, the enjoyment of it being postponed during the life of Sonao Kunwar. We also think that upon the language of the compromise it is not possible to hold that the character of the estate as it had been handed down from father to son for generations was changed. As an impartible estate Sheopal Singh laid claim to it, and the compromise provided that as an impartible estate it should devolve upon him. The concession made to Sonao Kunwar by him was that she should enjoy for her life and sit upon the gaddi as gaddi-nashin, his occupation of the gaddi being postponed. On the death of Sheopal Singh, therefore, the estate in our opinion devolved according to the rules of primogeniture governing impartible estates and did not pass to his widow as an estate governed by the ordinary rules of Hindu law. We therefore think that the suit of the plaintiff ought to have been dismissed. We allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.

The objections under section 561 of the Code of Civil Procedure necessarily fail and are dismissed with costs.

Appeal decreed.